Internal Revenue Service

memorandum

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Br2:JMPanitch

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to: District Counsel, Laguna Niguel W:LN
Attn: Anne N. Solwick, Paralegal Specialist

from: Assistant Chief Counsel (Tax Litigation) CC:TL

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subject: Inconsistency Between LGM TL-2 and IRM MS 45G-344

This responds to your request for tax litigation advice of February 28, 1989.

ISSUE:

Whether the Service will follow the published position set forth in Rev. Rul. 190, 1953-2 C.B. 303.

DISCUSSION:

Generally, a taxpayer's costs of transportation between his residence and his permanent place of business or employment are considered nondeductible personal expenses. Commissioner v. Flowers, 326 U.S. 465 (1946); Treas. Reg. §§ 1.162-2(e) and 1.262-1(b)(5). However, Rev. Rul. 190, 1953-2 C.B. 303 provides an exception to this general rule and holds that daily transportation costs incurred by construction workers, in going between a metropolitan area (in which they ordinarily work at various temporary jobs) and a temporary work location outside such area, are deductible business expenses. Thus, Rev. Rul. 190 contemplates a two-pronged test. First, the job to which the taxpayer is going must be temporary. Second, the job to which the taxpayer is going must be outside a given "metropolitan area."

In Litigation Guideline Memorandum (TL-2) dated January 22, 1988, entitled "Transportation Expenses -- Cases Involving Application of Rev. Rul. 190, 1953-2 C.B. 303", all attorneys in the Office of Chief Counsel are instructed to follow the position set forth in Rev. Rul. 190 to determine the deductibility of commuting expenses; that is, only daily transportation expenses incurred in going between a taxpayer's residence and a temporary job site located outside the metropolitan area in which the taxpayer ordinarily works are deductible.

After LGM TL-2 was issued, a change was made to the Internal Revenue Manual in March 1988 (MT 4500-444) in which the Service instructed its examiners to follow the position in Rev. Rul. 190. In other words, a taxpayer must satisfy the two-pronged test of Rev. Rul. 190 in order to be entitled to a deduction for transportation costs. Thus, the instructions given in LGM TL-2 and MT 4500-444 are consistent.

Then, on November 14, 1988, the Service issued a supplemental to the Internal Revenue Manual (MS 45G-344), which reversed the instruction given in MT 4500-444 and informed its examiners that pending further instruction, they should concede substantiated transportation expenses incurred in commuting to temporary job sites regardless of the distance traveled. This new instruction in MS 45G-344 is, of course, inconsistent with LGM TL-2 which follows the position in Rev. Rul. 190.

We coordinated with the Income and Accounting Division of Technical (CC:IT&A) and alerted them to the inconsistency between our litigation instructions in LGM TL-2 and the examination instructions in MS 45G-344. The Income and Accounting Division advised us that the primary reason for reinstituting the "concession" in MSG-344 was to avoid having to raise and litigate the issue of whether a taxpayer's daily commute was within or without the metropolitan area in which the taxpayer ordinarily works. Such litigation would inevitably ensue without a clear (objective) definition of what the Service means by outside the metropolitan area in Rev. Rul. 190 (or "beyond the general area of your regular place of work" as set forth in Pub. 17, Your Federal Income Tax (for 1988), at page 101).

In an attempt to try and resolve the above-noted inconsistency between MS 45G-344 and LGM TL-2, a revenue ruling project has been opened to update Rev. Rul. 190 to provide guidance that would propose a definition of "metropolitan area" as a nondeductible "commuting area" with a 35-mile radius centered on the taxpayer's regular place of residence. As with Rev. Rul. 190, such an objective rule would apply only to daily transportation expenses incurred in going between the taxpayer's residence and temporary job site.

Because of the issuance of MS 45G-344 and the opening of a revenue ruling project to update Rev. Rul. 190, we have decided to revise LGM TL-2. Our revision of LGM TL-2 will be consistent with the instruction set forth in MS 45G-344. That is, LGM TL-2 will be revised to instruct that the Service will concede substantiated transportation expenses incurred in commuting to temporary job sites regardless of the distance traveled.

In view of the above, the "outside the metropolitan area" test of Rev. Rul. 190 should not be followed and Harris v. Commissioner should not be relied upon. The only issue regarding the deductibility of substantiated transportation costs is whether the taxpayer's employment is temporary. The deductibility of these costs does not depend on the distance traveled.

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